No. 12,448

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*

vs.

FLORENCE K. LIVINGSTON, Executrix of the Will of Bronte M. Aikins, Deceased (sued herein as B. M. Aikins), FLORENCE K. LIVINGSTON, Executrix of the Last Will of Florence L. Kirchen, Deceased, GEORGE B. PARKER, NELLE GRENVILLE PARKER, VERNON S. BATZ (also known as V. S. Batz), EDNA BATZ, D. M. JORDAN, GEORGE HAY CORPORATION, LTD. (a corporation), HONOLULU OIL CORPORATION (a corporation), SEABOARD OIL COMPANY OF DELAWARE (a corporation), and the COUNTY OF KERN, *Appellees.*

Appeal from the United States District Court for the Southern District of California.

BRIEF FOR APPELLEES.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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Appeal from the United States District Court for the Southern District of California.

BRIEF FOR APPELLEES.

JURISDICTION.

This is an appeal by the United States as plaintiff and appellant from a judgment entered on August 22, 1949, quieting title to the land which is the subject of this action in the appellees and against the United States (R. 43). The jurisdiction of the District Court was invoked under the provisions of 28 U.S.C. 1345, and the jurisdiction of this Court, derived from the provisions of 28 U.S.C. 1291.

STATUTE INVOLVED.

The basic statute upon which the rights of the parties in this case must be determined is the act of Congress of March 3, 1853, 10 Stat. 244, Chap. 145, granting to the State of California, for the support of the common schools, Sections 16 and 36 in every township of the public domain within the state. The pertinent portions of this Act are set forth in the Appendix at pages i and ii.

QUESTION PRESENTED.

Did the State of California acquire title to the land, which is the subject of this action, by reason of the approval, on November 18, 1893, and acceptance[1] on January 31, 1894, of an official survey (the Carpenter survey) made by the Land Department, designating the land in question as a portion of Section 36, Township 29 South, Range 20 East, M.D.B.M., the said land on these dates being unsurveyed, unappropriated public domain of the United States.

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[1]The mere completion of the work of surveying was not sufficient to vest title in the state. It was necessary that the survey first be approved and the act of approval and its date fixed the time when title vested in the state to school sections. It is to be noted that prior to April 17, 1879, all that was necessary in the way of approval of the plat of a particular survey was that it be approved by the Surveyor General of the particular state in which the survey was made. See *Frasher v. O'Connor,* 115 U.S. 102. On April 17, 1879, however, instructions were issued by the General Land Office that no plats of surveys be filed in the local land offices until they had been approved by the General Land Office. Therefore, before 1879 approval of a survey by a state Surveyor General was the act of approval which fixed the time when title to a school section passed to a state; after that year acceptance and approval by the General Land Office of a survey fixed the time when title to a school section passed to the state. See *U.S. v. Cowlishaw*, 202 Fed. 317 (D.C. Ore. 1913); *F. A. Hyde & Co.,* 37 Land Decisions 164 (1908).

STATEMENT OF THE CASE.

On May 2, 1947, appellant instituted this action to quiet title to, and to enjoin purported trespasses by appellees upon, certain land in Kern County, California, located in Section 36 of Township 29 South, Range 20 East, M. D.B.M. (R. 2-14, 51). This was done more than 54 years after the approval of the Carpenter survey of 1893, and approximately 33 years after the State of California had issued its patent to one Judson H. Jordan for the land involved in this controversy, which is a portion of the land delineated as Section 36 by the approved Carpenter survey. Appellees deraign their title to, or possessory rights in the land by mesne conveyances from Jordan (R. 162).

After a trial on the merits, the Court below ruled in favor of appellees, and on August 22, 1949, entered judgment quieting title in them against the appellant (R. 43-45).

Appellees do not dispute, and hereby adopt the statement of facts contained in appellant's brief at pages 2 to 7 inclusive, but in addition to the statement of the case as made by appellant, the following facts should be noted by this Court.

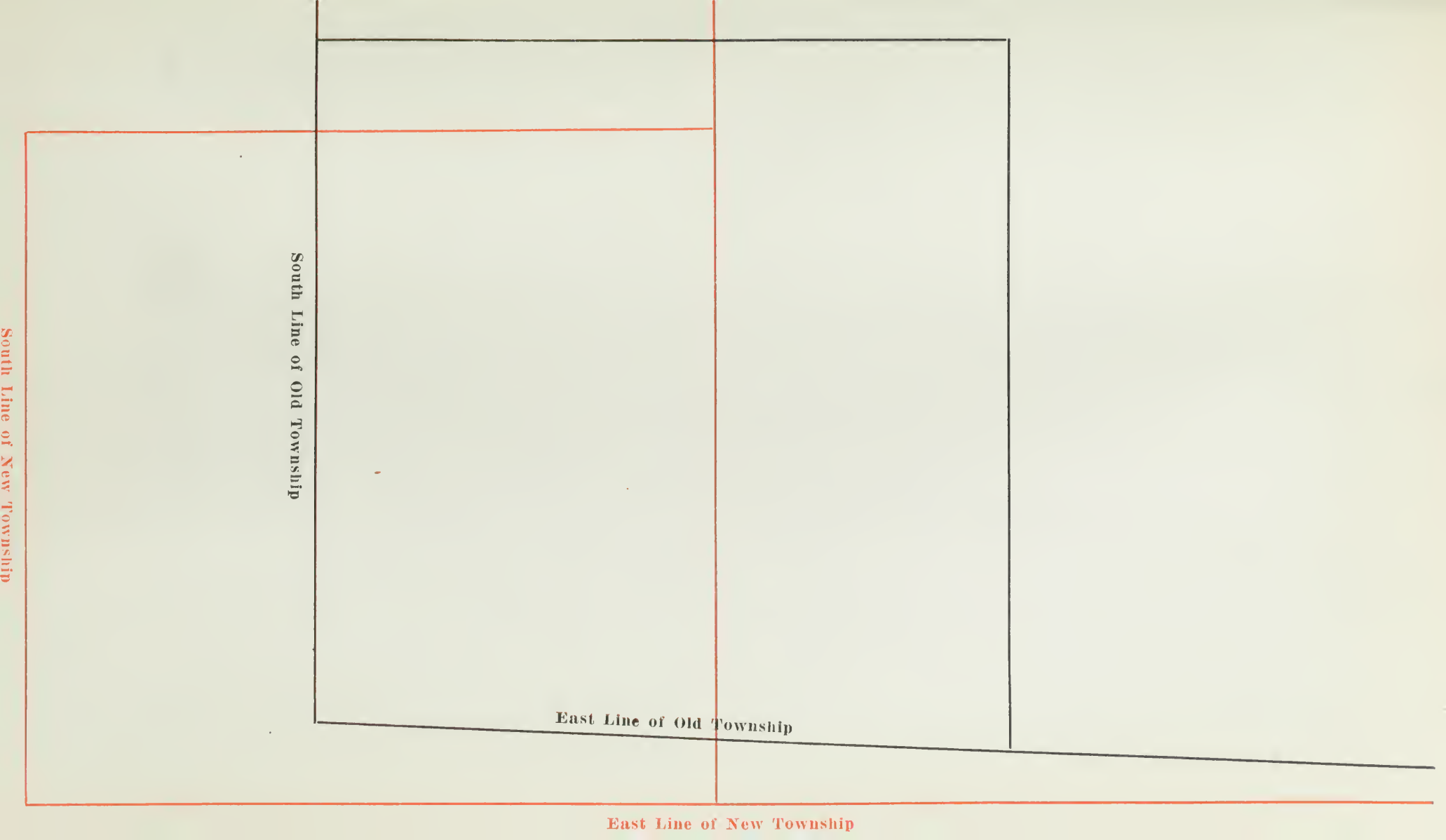
In employing Howard B. Carpenter to make the so-called Carpenter survey of 1893, the instructions issued to said Carpenter by the United States Surveyor General for California directed Carpenter to make a *new* survey of Township 29 South, Range 20 East, M.D.B.M., and further instructed him to obliterate the lines and corners established by Reed in said township in the Reed

survey, and to ignore the Reed survey in making his own (Carpenter's) survey (R. 107).

Prior to the Carpenter survey of 1893, the land involved in this litigation was an *unsurveyed* area of land, a part of the public domain of the United States (R. 95) and not included within the boundaries of Township 29 South, Range 20 East, M.D.B.M., or any adjoining township.

The aggregate area of public land shown to be within Township 29 South, Range 20 East, M.D.B.M. by the Reed Survey of 1869 was 23,083.97 acres (R. 12). The Carpenter survey of 1893, resurveying the said township, placed the easterly boundary line of said township slightly to the East of said boundary as delineated by the Reed survey, and placed the southerly boundary of said township to the South of said boundary as delineated by the Reed survey, and increased the area of land in said township to 24,939.47 acres (R. 13), and for the first time, included within the boundaries of any township the previously unsurveyed land which is the subject of this action (R. 12, 13, 95). The difference in the two surveys, both of which were ordered and approved by the same political authority, is illustrated by the chart facing this page, showing in black the exterior lines of the Reed survey of 1869, and in red the exterior lines of the Carpenter survey of 1893.

All taxes assessed upon or against the land involved in this action have been fully paid by said Judson H. Jordan, or the defendants, or some of them, as his successors in interest (R. 166).


South Line of Old Township
East Line of Old Township
South Line of New Township
East Line of New Township

From and after the passage of the Granting Act of 1853 (10 Stat. 244, Chap. 145) as the surveys of the public lands progressed throughout the State of California, it sometimes happened that surveys delineated Sections 16 or 36 in various townships throughout the State as containing more than 640 acres, and in numerous instances the excess acreage in such sections amounted to several hundred acres. The excess acreage in said school land sections was not objected to by the United States, and said surveys were approved as made and returned, and in each case the State of California received title to the Section 16 or 36 as it was identified by the approved survey regardless of the acreage therein contained. Approximately 145 such school land sections containing excess acreage were surveyed within the State of California, and the surveys approved. (See Appendix "A" to appellees brief filed with the Trial Court, and photostatic copies of plats of survey referred to therein, made a portion of the record pursuant to stipulation, R. 196).

In at least thirty-six instances, the whole or a portion of the lands lying within these Sections 16 or 36 containing excess acreage was unavailable in place to the State of California by reason of the existence therein of minerals, or because of pre-emption claims, or for some other reason. In each of these instances, the State of California claimed land lost from such sections, and lieu lands were certified to the State of California by the United States for an amount sufficient to give the State of California on account of such section, an area of land equal to the number of acres in the section as originally surveyed, although the certification to the

State of California of such lieu lands resulted in the State receiving a total acreage for such section in excess of 640 acres (See Appendix "B" to appellees' brief filed with the Trial Court, made a portion of the record pursuant to stipulation, R. 196).

The total number of acres contained within the area of land embraced by both the Reed survey of 1869 and the Carpenter survey of 1893 is 943.14 acres (R. 14).

ARGUMENT.

There is but one basic issue to be decided by this Court, and that is whether under the plain words of the Granting Act of 1853 (10 Stat., Chap. 145), the approval and acceptance of the Carpenter survey of 1893 operated to vest title in the State of California to the land in litigation, said land at the time of the approval of said survey being vacant, unappropriated, theretofore unsurveyed, public domain of the United States.

Not much can be added to what the lower Court had to say in its Memorandum Opinion (R. 28-42), which clearly sets forth the legal principle involved in this case. Unless appellant can demonstrate the asserted error of the Court below in holding that title to the land in question passed as a matter of law to the State of California, this appeal should fail. Nothing has been shown by appellant which would cast any doubt on the correctness of the District Court's judgment.

The appellant has simply stated (appellant's brief, page 8) that title to the land in question did not pass to

the State of California. Appellant asserts this to be the fact, because, it says:

(a) The Reed survey passed title to the land embraced within it to the State, which fixed the rights of the parties; the State received "all the land to which it was entitled" and the Carpenter survey could not result in the United States recovering any of the land embraced in the Reed section, nor could it pass title to any additional land not embraced in the Reed section;

(b) Both the United States and the State of California were "mutually estopped" to make any claims inconsistent with the original Reed survey; (The fact that the State disposed of the lands covered by the Reed survey is another basis for the argument of estoppel);

(c) The practice of the United States in the case of other resurveyed sections was to assert title to the land covered by the resurvey and therefore this should be controlling here;

(d) The State of California never claimed title to the land in question;

(e) The decision of the District Court creates two Sections 36, whereas the Granting Act intended there to be only one Section 36;

(f) It was not the "intent" of the Commissioner of the General Land Office, in making and approving the Carpenter survey of 1893, to pass title to the State to the land included therein.

These various contentions, as stated by the District Court in its Opinion (R. 36), all come down to the ultimate contention by appellant that there is something which prevents the State of California from ever receiving more than 640 acres on account of any Section 16 or 36 in a particular township, and that once the State has received such a full-sized section (or its equivalent), it is forever satisfied and the force of the Granting Act has become exhausted. We shall take up the appellant's grounds for contending that title did not pass as briefly as possible in connection with the basic legal principle applicable to school land grants.

I.

THE GRANTING ACT OF 1853 WAS A PRESENT GRANT OF SECTIONS 16 AND 36 OF EVERY TOWNSHIP AND TITLE TO THE LAND THEREIN VESTED IN THE STATE IMMEDIATELY UPON THE APPROVAL OF A SURVEY OF THE TOWNSHIP IN WHICH THE SECTIONS WERE FOUND, WITHOUT THE NECESSITY OF ANY FURTHER ACT ON THE PART OF THE STATE, THE LAND DEPARTMENT, OR ANYONE ELSE.

This fact is recognized by appellant in its brief (pages 8, 9), but appellant seemingly overlooks the significance of this proposition.

It must be remembered that this whole case rests upon the construction of the words of donation in the Granting Act of 1853, which in plain, simple and unambiguous language states that Sections 16 and 36 "* * * shall be and hereby are granted to the State, for the purpose of public schools in each township, * * *"

It is settled law that under the various school land grants (all of which have been construed by the courts in harmony with their broad, general purpose) title to the land granted to the State vested in the State without the necessity of any further act by either the State or the United States, upon the approval of the survey delineating those sections within any particular township. As stated in the leading case of *Cooper v. Roberts,* 18 How. 173 (1856), at page 179,

> "We agree, that until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. *But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title.* The *jus ad rem* by the performance of that executive act becomes a *jus in re,* judicial in its nature and under the cognizance and protection of the judicial authorities, as well as the others. Gaines v. Nicholson, 9 How. 356." (Emphasis supplied.)

The cases cited by appellant on pages 8 and 9 of its brief are all to the same effect; namely, that title passed to the State immediately upon the approval of a survey delineating a particular Section 16 or 36, provided, of course, that the land so included was in a condition to pass to the State, that is, not mineral land, Indian or other reservation, appropriated, or for some other reason unavailable.

There is nothing in the Granting Act of 1853 itself, or in any decision construing school land grants, which would indicate that the force of the Act is exhausted by the operation of a single survey, or which would in any way limit the effect of the approval of any survey delineating a portion of unappropriated public domain as lying within Sections 16 or 36 of a township. Much of appellant's argument is founded on the mere assertion that the Granting Act operated to vest title only in the case of an original survey but never in the case of a resurvey. It should be borne in mind, however, that, as will be more clearly pointed out below, insofar as the particular land here in question is concerned, the Carpenter survey of 1893 was not a resurvey in any sense of the word; it was the first and original survey that had ever included the land in question within the boundaries of any surveyed township; prior to the Carpenter survey of 1893 this land was a portion of the unsurveyed public domain of the United States (R. 95).

Unless, therefore, the appellant can demonstrate successfully to this Court why the usual and invariable result did not follow the approval of the Carpenter survey of 1893, it must be held as a matter of law that title to the land in litigation passed to the State of California on the approval of that survey.

II.

THE FACT OF THE REED SURVEY HAVING BEEN MADE AND APPROVED IN 1869 IS NOT DETERMINATIVE OF THIS CASE.

Appellant, on pages 10, 11 and 12 of its brief, argues the point that once title had passed to the State of California under the Reed survey, the United States could not get this particular parcel of land back, and it argues from this that the rights of the State and the United States were forever fixed by the making and approval of that survey.

It is true that, as stated by appellant, a resurvey in and of itself does not operate to impair vested rights, or to divest legal title which has vested under a prior although erroneous survey.

> *United States v. State Investment Co.*, 264 U.S. 206 (1924).

As we will point out below, however, this rule has no bearing upon the question whether an approved survey *which itself operates to cause title to the land which it identifies to vest under a Congressional grant of unappropriated public domain,* is effective to vest title to such land in the State.

Passing this point for the present, it is obvious that the real contention of appellant is the simple proposition that because the State of California in 1869 received, under an erroneous survey, certain land to which it would not have been entitled had the survey been correct, the *correct and approved* Carpenter survey did not operate to pass title to the State, for *the sole reason that the State would thereby acquire more than 1280 acres of school land in the township.*

The fact of the Reed survey having been made and approved is wholly irrelevant to the question in this case, which question is, simply, what was the effect of the approval of the Carpenter survey of 1893? The approval by the Surveyor General of Reed's 1869 survey may have been erroneous because the survey itself was wrong, but if so, this was simply an error committed by the Surveyor General. The effect of this approval was to vest title to a certain parcel of land in the State of California. Whether or not the United States could have, after the Carpenter survey of 1893, recovered this identical portion of land from the State after the survey was made is really immaterial.

The Reed survey of 1869 was entirely superseded by the Carpenter survey of 1893, and the area of land surveyed by Reed *ceased to be Section 36* upon the approval of the Carpenter survey; this for the reason that the Carpenter survey amounted to a cancellation of the Reed survey.

Cox v. Hart, 260 U.S. 427 (1922).

The fact that the Reed survey may have erroneously operated to vest title to certain land in the State of California, therefore, has nothing to do with the question of whether the land involved in this litigation, which is in the only presently existing Section 36 in this particular township vested in the State of California as a portion of that Section 36. Part of the land covered by the Reed survey is no longer in Section 36. It is simply a parcel of land the legal title to which vested in the State of California by reason of a mistake on the part of the Land Department. It would seem obvious that this mistake, and this conse-

quent vesting of legal title under the Reed survey, cannot be determinative of the question whether the approval of a subsequent survey caused title to unappropriated, unsurveyed public domain in the only presently existing Section 36 in this particular township, to vest in the State of California. It cannot be too strongly emphasized that *the only Section 36 in this township is the one delineated by the Carpenter survey of 1893,* which fact, incidentally, was confirmed by the Wilkes segregation survey of 1915.

Appellant has cited (Brief, p. 13) a number of cases to the effect that where land has been *patented,* a resurvey does not have the effect of either enlarging or diminishing the area of land conveyed to the patentee by the patent. This is, of course, a well recognized principle, but it does not, as the appellant says it does on page 13 of its brief, dispose of the question in this case. A patent, once given, defines the rights of the patentee and vests title in him to the particular area of land embraced by the patent. In order to avoid confusion and conflict in patents issued by the United States, it has always been held that the original survey controlled the grant of the patent, so that neither a subsequent resurvey nor a subsequent conflicting patent could either divest or enlarge the rights of the patentee, as fixed by the patent, as applied to the survey in force at the time the patent was issued. There is nothing in any of these cases, of course, that even intimates that, if a *second patent* were issued to the patentee after a corrective resurvey had been made, the patentee could not acquire rights under the new patent. Appellant has already recognized in its brief (pages 8, 9) that in the case of school land grants no patent is necessary

and no patent, in fact, has ever been issued in the case of a school land grant, for the reason that the approval of the survey, either by the State Surveyor General before 1879, or the Commissioner of the General Land Office after that date *has the effect of a patent.* In other words, *the approval of a survey of a Section 16 or 36 of unappropriated public domain operates to convey title exactly as does a patent, in the case of other lands, issued by the Land Department.*

If appellant wishes to pursue this analogy, therefore, it is simply saying that a second "patent" was issued to the State of California when the General Land Office approved the Carpenter survey of 1893, because it is established law that the approval of the survey of a Section 16 or 36 operated to convey title exactly in the same way that a patent would have conveyed it.

This distinction is most important, and it must be remembered that the unique operation of surveys in regard to school land grants is not comparable to the effect of surveys where patents, in other cases, are issued under the public land system of the United States. Under the school land grants, the official approval of a survey by the Land Department operates to convey title exactly in the same way as would a patent or other conveyance by such Department.

Heydenfeldt v. Daney Gold Mining Co., 93 U.S. 634 (1876);

Cooper v. Roberts, 18 How. 173 (1856);

Sherman v. Buick, 93 U.S. 209 (1876);

Frasher v. O'Connor, 115 U.S. 102 (1885);

U. S. v. Morrison, 240 U.S. 192 (1916).

Official approval of a survey of a Section 16 or 36 in any township, therefore, has a particular significance in relation to school land grants because, as we have said, such approval constituted, in effect, the giving of a patent by the United States to the State. It is, therefore, impossible to draw any analogy from the usual patent cases as to the operation of a second survey for the reason that, as we have stated above but cannot too strongly emphasize, the second or Carpenter survey of 1893 operated to pass title in the same way as a second patent would so operate, just as the first or Reed survey operated to pass title if said land had been granted by means of a patent. In the usual case of the issuance of a patent, the survey has no particular significance except as *identifying the parcel of ground upon which the grant of the patent operates;* in the case of school land grants, however, the survey itself performs a second and essential function, which is that *its approval operates to vest title* in the State to the lands covered by the survey.

The case of

Kissell v. St. Louis Public Schools, 18 How. 19 (1855),

cited on page 14 of appellant's brief is not a case involving school land sections as they were granted under the Granting Act of 1853. That case involved Acts of Congress of June 13, 1912, May 26, 1824, and January 27, 1831, and under these Acts the United States granted to the State of Missouri or to the inhabitants of certain towns therein "towns or village lots, out lots, and common field lots" adjoining these certain towns, for the use of public schools. The act in question under which the

survey in the *Kissell* case was made was the Act of May 26, 1824, which granted these lots which were vacant and uninhabited to the towns and villages for the support of schools. The Act provided that the owners of such lots as were already under cultivation or in possession of private persons should designate them to enable the Surveyor General to distinguish the private lots from the vacant lots, and further provided that the Surveyor General should survey, designate and set apart to the towns and villages so much of the vacant lots as did not exceed one twentieth (1/20th) part of the lands included in the general survey of the town. Under this Act the Surveyor General issued certificates entitled certificates of "Assignment and Survey". Clearly, the grant in the *Kissell* case resembled the issuance of a patent and was not a continuing[2] grant of designated sections of land such as is found in the Act of 1853. The situation in the *Kissell* case, therefore, does not compare to the situation under the school land grants of sections of townships in the western states which were enacted many years later.

The case of

Heydenfeldt v. Daney Gold Mining Co., 93 U.S. 634 (1876),

simply held that the Nevada Enabling Act of March 21, 1864 (13 Stat. 30) was to be construed in granting Sections 16 and 36 to the State of Nevada as excluding from the grant the whole or any part of such sections as had

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[2]It certainly was contemplated by Congress that the Act of 1853 would necessarily continue in force and effect for an indefinite period of time in order that, as the surveys of the public lands progressed throughout the state, Sections 16 and 36 in each township would pass to the state when they were surveyed. It is obvious that the Granting Act is still in force and effect for there are some townships in California that have not yet been completely surveyed.

been previously disposed of by Congress and that the mineral claims on these sections rendered them unavailable to the State to the extent of such mineral claims.

III.

THERE IS NO LIMITATION ON THE AMOUNT OF SCHOOL LAND TO BE RECEIVED BY A STATE IN ANY TOWNSHIP.

Inherent in the whole argument of appellant is the underlying theory that the State, once it receives a section containing 640 acres, is forever satisfied because the State cannot legally get any more school land than this amount. This is the only possible explanation for its argument that the approval of the Reed survey forever fixed the rights of the parties, for what other basis can there be for this assertion?

Appellant has argued that the State was "estopped" to claim any more land than was included in the original survey, and for this proposition has cited (Brief, p. 15) the case of

United States v. Oregon, 295 U.S. 1 (1935).

Appellant asserts that the State of California, by accepting the land embraced within the Reed survey and further by accepting a lieu selection on account of a portion of that section which was unavailable in place, is estopped to claim any land under the Carpenter survey. We admit, in fact we assert, that the State was entitled to all the land embraced within Reed's Section 36 and to lieu lands for any land within that section which was unavailable in place to the State. However, we do not think that this fact has any significance in this case.

The case of *United States v. Oregon* presents an application of another well-known rule, which does not come into play in this case. All that case stands for is that, if the State takes land in lieu of all or any part of the base section, the State, in effect, "trades horses" with the Government, and having so taken land elsewhere, in lieu of the particular land which was unavailable, it waives all right, title and interest in and to such base. Consequently nothing that thereafter happens to such base is of interest to the State because it has previously made an exchange; the base land can thereafter be enlarged, diminished or relocated without any prejudice to the right of the State because it has said, in effect, "I relinquish all my right to Section 36 in consideration that you give me another section elsewhere." There is nothing anywhere in that or any other case to indicate that because the State receives land in lieu of a *portion* of a school section unavailable in place, it has thereby waived its rights to the balance of such section. Only if the State of California had taken land in lieu of the particular land here involved would *United States v. Oregon* be a controlling precedent; such, of course, is not the case.

The situation in *United States v. Oregon,* therefore, is not a fair analogy to the present situation, and the rule of law applicable to the relinquishment of base school sections by the State taking lieu sections, does not operate here.

The argument of estoppel made by appellant is, basically, that an original survey of a township delineating the school land sections therein amounts to a settlement or agreement between the United States and the State as

to such township that the land included within the school sections as surveyed—and that land alone—is school land of the State, and that all other land in the township excluded from such sections remains (ignoring pre-empted or other similar lands) public domain of the United States. Even assuming for the purpose of argument that this can be so, it is plain that this "estoppel" can operate only as to land *which is included in the township as surveyed.* It is plain that it could not affect land such as the land in question which was excluded from Township 29 South, Range 20 East, M.D.B.M. by the Reed survey, and, which, in fact, was never (until the Carpenter survey) included within the boundaries of any surveyed township. No so-called estoppel arising from the making and approval of the Reed survey therefore could have affected the land in question which was never covered by such survey.

As we have already noted, the Granting Act, in plain and unambiguous language, grants to the State Sections 16 and 36 in every township, and there is no limitation upon this language. The surveying statutes of the United States now in force, and in force at the time of the surveys herein involved (43 U.S.C. 751, and following) contemplate an orderly system of surveys progressing from East to West, but there is nothing therein which limits the size of a school land section or any other section to 640 acres. The fact that sections may be larger or smaller than the ideal is recognized by the surveying statutes (43 U.S.C. 752, Par. 3rd) wherein it is provided that each section or subdivision of a section, the contents whereof have been returned by a survey made by the Field Sur-

veying Service "* * * shall be held and considered as containing the exact quantity expressed in the return." Thus it is the section as actually surveyed, whether containing more or less than 640 acres, that governs in the disposal of the public lands.

State of Florida v. Watson, 17 Land Decisions 88 (1893).

An act of Congress subsequent to the Granting Act (26 Stat. 796, 43 U.S.C. 851) provides that a state can select lieu lands where Sections 16 or 36 are fractional in quantity. This amounts to a legislative declaration that a state is entitled to *at least* 640 acres in, or on account of, each of Sections 16 and 36. There is no indication anywhere, however, that a state is *limited* to an area of 640 acres for any school land section.

As appears from the evidence contained in the appendices to appellees' brief filed with the District Court (R. 196), the public surveyes in the State of California produced 145 school sections which were surveyed out as containing more than 640 acres, and the United States in each instance made no objection to the State receiving the full acreage contained in each of these sections. One of these sections, for example, Section 36, Township 12 North, Range 18 East, M.D.B.M., contains 1,716.70 acres, and several other sections contain over 1,000 acres, and many contain in excess of 700, 800 and 900 acres.

Furthermore, as appears from the excerpts from the official clearlists contained in Appendix "B" to appellees' brief before the District Court (R. 196), in many cases the United States actually certified to the State of California lieu lands for losses in these oversized sections in amounts

sufficient to make up the acreage as surveyed out in the section, even though it greatly exceeded 640. For example, in the section above noted containing 1,716.70 acres, the United States certified to the State of California 1,076.70 acres of lieu lands for lands which were unavailable in place to the State within that section; this, although the State had already received exactly 640 acres in place within the section!

As stated by the District Court in its opinion (R. 34, 35), it is a matter of common knowledge that the State in many instances received school lands in various townships greatly in excess of the normal acreage which would be in Sections 16 and 36, that is, 1280 acres. There is nothing to prevent the State from receiving this excess acreage, because the Granting Act speaks in terms of sections, not acres. Unless it can be demonstrated that, as a matter of law, the State was limited to a maximum of 640 acres for each Section 16 and 36 within any particular township, there is no basis for the argument of estoppel because that argument assumes that the State got everything that it could legally receive when it received 640 acres under the Reed survey. Under both the Reed and Carpenter surveys, the State of California received a total of 1,583.14 acres of school land in the township. Far greater acreages of school land than this were received in other townships.

If, as the District Court stated in its opinion (R. 35) there is any limitation on the amount of land that can be received by the State for school lands, then all the *original* surveys of which we have just spoken should be void and of no effect as passing title to the State to any more

than 640 acres for each section; but as we have shown, this was never considered to be the case. There is no logical reason why, under the plain words of the Act, the State should not receive on account of Section 36, Township 29 South, Range 20 East, M.D.B.M., a total of 943.14 acres on two surveys, than why it should not have received this amount on one survey.

Appellant asserts (Brief, p. 18) that the decision of the Court below results in creating two Sections 36, and that the Granting Act granted to the State only one Section 36. This is not so. The only Section 36 now existing in Township 29 South, Range 20 East, M.D.B.M., is the Section 36 created by the Carpenter survey of 1893, and reaffirmed and re-established by the Wilkes segregation survey of 1915. The school land excluded from the Carpenter survey which vested in the State because of the approval of the mistaken Reed survey is not now in Section 36; the land in controversy lies within the only legally existing Section 36 within the township.

A close analysis of every contention of the appellant discloses that the basic assumption upon which each is rested is that the State is not entitled to more than 640 acres of school land for any Section 16 or 36 within the township; the various arguments in relation to resurveys, patents, and estoppel may unfortunately serve to confuse and obscure this basic assumption, but cannot eliminate it. If it be admitted by appellant (as it must be) that the State is entitled to a school section in place, regardless of whether it contains 640 acres or 1,000 acres, as delineated in one approved survey, we fail to see how appellant can argue that the mere fact that 943.14 acres

vested in the State under two different, approved surveys, both made and approved by the arm of the Government having jurisdiction to make and approve them, somehow establishes a different rule.

IV.

TO HOLD THAT THE APPROVAL OF THE CARPENTER SURVEY OF 1893 WAS INEFFECTIVE TO VEST TITLE IN THE STATE OF CALIFORNIA WOULD BE A JUDICIAL INVASION OF THE EXCLUSIVE JURISDICTION OF THE LAND DEPARTMENT OVER THE PUBLIC DOMAIN.

The appellant argues (Brief, pp. 18, 19) that the decision of the Court below has the effect of always giving the State "both sections" in the case of a resurvey, and that it was not the "intent" of the Commissioner of the General Land Office to vest title to the State to Section 36 under the Carpenter survey. We think the simple answer to this is that the effect of the Carpenter survey of 1893 did not depend upon any undisclosed "intent" of the Commissioner of the General Land Office, but rather upon the legal effect of the survey in the light of the Granting Act of 1853.

It is axiomatic that Congress has the supreme power and authority to dispose of the public lands of the United States by means of such legislation as it sees fit to enact. Congress, therefore, when it enacted the school land grant of 1853 by which it, in clear and specific language, granted every 16th and 36th section in each township to the State of California, expressed its supreme and ultimate decision as to the disposition of these public land sections,

leaving no room for any department of the Government to speculate on what should have been done, or ought to have been granted to the State of California. Acting under the authority of this congressional grant, the Land Department is vested with the exclusive power and jurisdiction to make the surveys or correct the surveys which locate these school land sections within any particular township of the public domain.

Cragin v. Powell, 128 U.S. 691 (1888);
Knight v. United States Land Association, 142 U.S. 161 (1891);
Gleason v. White, 199 U.S. 54 (1905).

Under these cases, the power of the Land Department to make and correct surveys of the public lands is exclusive and supreme, and a survey of the public lands, once approved, can only be attacked in a direct proceeding for that purpose to set aside or annul the survey. In other words, the Courts will not attempt to decide for themselves questions concerning the correctness of matters which by law are committed to the Land Department.

There can be no doubt that when the Carpenter survey of 1893 was made, the land in question was a part of the public domain of the United States, since, prior to such time, such land was *unsurveyed unappropriated land* of the United States.

Prior to the Carpenter survey the land in question had never been by any survey placed within the boundaries of any township; a hiatus existed between the boundaries of Township 29 South, Range 20 East and the adjoining townships, and the land in question had not been

either included in or excluded from a school section in any surveyed township prior to the Carpenter survey (R. 95). Thus, insofar as the land in question is concerned, the Carpenter survey of 1893 was not a resurvey in any sense of the word; it was the first survey that had ever been made that affected in any way that particular land.

Such lands could have been disposed of by the Land Department under any of the many laws relating to the disposal of public lands of the United States. Prior to the Carpenter survey it could, for example, have been patented to a purchaser thereof. The Land Department in 1893 was perfectly aware of the indisputable law that the approval of an official survey of a township operated to vest title in the State to Sections 16 and 36 if the same were unappropriated public lands. Can there be any doubt that the Land Department, acting within its exclusive jurisdiction, had the power to dispose of the land in controversy (as unappropriated public land at the time of the Carpenter survey) by ordering the Carpenter survey to be made, the legal effect of the approval of which, the Land Department knew, would be to vest legal title in the State? Such method of disposal was merely one of several available to it.

It necessarily follows, therefore, that *the Carpenter survey of 1893 was as effective a method of disposal of the public lands of the United States by the Land Department as would have been a deed, patent, or any other method of conveyance which the Land Department might adopt.*

For this Court to hold, therefore, that the Carpenter survey of 1893 was ineffective for any purpose would obviously be to invade and intermeddle with the jurisdiction of the Land Department.

Knight v. United States Land Association, 142 U.S. 161 (1891).

It is axiomatic that the Land Department in 1893 had the exclusive power and authority to order the Carpenter survey to be made; that it had the power to dispose of the public lands of the United States; that all that was necessary to cause legal title to vest in the state to school lands was that they be identified by an approved survey as a portion of Sections 16 or 36 in a particular township; and that, therefore, in ordering the Carpenter survey to be made, which survey necessarily the Land Department knew would ascertain and designate these sections, the Land Department brought into operation the school land grant just as it brought that grant into operation every time it ordered a survey to be made of a township in the public domain.

On this question the language in

Beecher v. Wetherby, 95 U.S. 517 (1877)

is particularly apt. The Court there said, at page 524:

> "In *Cooper v. Roberts,* 18 How. 173, this court gave construction to a similar clause in the compact upon which the State of Michigan was admitted into the Union, and held, after full consideration, that by it the State acquired such an interest in every section 16 that her title became perfect so soon as the section in any township was designated by the survey. 'We agree,' said the court, 'that, until the

survey of the township and the designation of the specific section, the right of the State rests in compact, —binding, it is true, the public faith, and dependent for execution upon the political authorities. *Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But, when the political authorities have performed this duty, the compact has an object upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title.* The jus ad rem, by the performance of that executive act, becomes a jus in re, judicial in its nature, and under the cognizance and protection of the judicial authorities, as well as the others.' In this case, the township embracing the land in question was surveyed in October, 1852, and was subdivided into sections in May and June, 1854. *With this identification of the section the title of the State, upon the authority cited, became complete,* unless there had been a sale or other disposition of the property by the United States previous to the compact with the State.'' (Emphasis supplied.)

Since the Granting Act made it possible for the State to receive 1280 acres *or more* in any particular township, it is obvious that in any township there were two ways in which the political authority charged with administration of the Act (the Land Department) could exercise its functions. It might have, through extreme care, so supervised the execution of the public surveys that no Section 16 or 36 ever contained more than 640 acres. It could have designated any excess land within a township as Tracts X, Y and Z, for example, and excluded it from Section 16 or Section 36. If it did this, the State, so long

as it received *at least* 1280 acres of school land in the township, would have no cause for complaint, and the action of the Land Department in this supposed case would certainly fall within any reasonable construction of the Granting Act. On the other hand, the Land Department might have accepted (as it did) surveys of the public lands showing school sections to contain greatly in excess of 640 acres. This exercise of the Land Department's exclusive jurisdiction under the Granting Act also did not violate any possible construction of the Granting Act, since the Act contains no limitation on the acreage which a state may receive.

Thus two courses in the survey of any township were open to the Land Department, neither of which the Courts could thereafter question once any one of them had been taken by the Land Department.

V.

ACTION TAKEN BY THE LAND DEPARTMENT AND THE STATE OF CALIFORNIA IN OTHER TOWNSHIPS IS NOT DETERMINATIVE OF THE ISSUE IN THIS CASE.

As we have already noted, appellant Brief, p. 18) argues that the decision of the District Court has resulted in creating two Sections 36 within the township, and that only one section was granted by the Act. We repeat that there is only one Section 36 in Township 29 South, Range 20 East, M.D.B.M., and that is the section established by the Carpenter survey. What was once Section 36 under the Reed survey is no longer so, although the State of California or its successors have title to the land which

was embraced within such former section. As we have stated, the only staff upon which appellant can lean, therefore, is the proposition that the State has received too much land. The basis of this argument is a mere matter of acreage, and as we have shown, the acreage of school land to which a State is entitled in any particular township has varied widely.

Appellant's real argument in relation to the situation in other resurveyed townships (Brief, pp. 17-19) is that in other resurveyed townships in which a similar situation existed, the State never claimed the land included within a Section 16 or 36 as delineated by a resurvey, and the practice of the Land Department was to treat these areas as continuing to remain a part of the public domain; that, in fact, the State never claimed title to the land in litigation here; that for the Court to depart from the situation as it now exists in other resurveyed townships would not only depart from the "administrative construction" of the Granting Act, but would also upset all existing titles in other resurveyed townships. We shall examine these contentions.

A. The Granting Act of 1853, being plain and unambiguous, is not susceptible of administrative interpretation or construction.

Assuming for a moment that what happened between the State of California and the Land Department in other resurveyed townships amounts to an administrative construction of the Granting Act (which, as will be seen, it does not), then we think it is perfecty plain, and settled law, that courts will adhere to an administrative construction or interpretation of a statute only where the statute

is ambiguous on its face and susceptible of more than one construction. Where the statute is plain and unambiguous, contemporaneous or practical (administrative) construction will not be regarded by the Courts.

Houghton v. Payne, 194 U.S. 88 (1904);
Sutherland on Statutory Construction, 3rd Ed. Vol. 2, Sec. 5104, p. 514.

It would be difficult to find another statute which is as brief, plain, positive and unambiguous as is the granting clause of the Act of 1853, namely, that sections 16 and 36 in every township "* * * shall be and hereby are granted to the State * * *"

Furthermore, if construction were proper, it must be borne in mind that in the application of any school land grant, the broad public purpose of such a grant should be furthered. It is well settled that school land grants, as distinguished from railroad grants and other private grants, must be liberally interpreted in favor of the State, and that a policy of strict construction should not be applied. This was recognized in

Johanson v. Washington, 190 U.S. 179 (1903);
Minnesota v. Hitchcock, 185 U.S. 373 (1902).

However, appellees submit that this is not a case in which administrative construction is permissible.

B. The record does not disclose that there has been any uniform administrative construction of the School Land Grant of 1853 by the Land Department.

Appellant asserts that there existed a uniform administrative practice on the part of the Land Department to treat the title to resurveyed school sections in other town-

ships as being in the United States. As will be seen below, however, there is no evidence of any *uniform* practice of the Land Department in such other townships and in the absence of evidence of such uniformity, the rule of administrative or practical construction is inapplicable.

U. S. v. Magnolia Petroleum Company, 110 Fed. 2d 212 (C.C.A. 10, 1939).

It may be that in the instances given in appellant's brief the Land Department took the position that title to the land in resurveyed school sections is now in the United States. The example of Section 36, Township 30 South, Range 21 East, M.D.B.M., given on page 17 of appellant's brief, is a case in which the United States never made any claim of title until some *four years after* the State had claimed title to the land in litigation in this case and thus offers no precedent as to the question of title to the land in our case, by way of administrative interpretation or otherwise.

As evidencing the lack of any real uniformity in the action of the Land Department, it should be noted that the Land Department itself recognized, as late as 1925, in a similar situation, *that if the State of California had claimed, and patented out or sold as school lands of the State, lands falling within a Section 16 or 36, as delineated by a resurvey, then the United States would not make any claim to such lands so sold or patented out by the State.*

In a letter dated May 2, 1925, from Thomas A. Havell, Assistant Commissioner of the General Land Office, addressed to the State Surveyor General of California (Exhibit F-3 to appellant's brief before the District Court, R.

196), the Assistant Commissioner had under consideration the effect of resurveys of school sections in fractional Township 11 North, Range 21 East, S.B.M., which township was surveyed first in 1883 and resurveyed in 1924. By the resurvey, the area of land in the fractional township was increased from some 7,000 acres to over 16,000 acres, and the State thereby became entitled to additional school lands within the township. The Assistant Commissioner stated that inasmuch as final adjustment had been made of the school land grant in that township, based upon the original plat of survey, it would appear to be the better method of procedure to consider the school section lands as shown by the resurvey to be public lands of the United States, in which event the State could select additional indemnity lands elsewhere to make up the amount of school land to which the State was entitled. The Assistant Commissioner went on to say, however,

> "If, however, the State has disposed of or contracted to sell or dispose of any of the lands in Secs. 16 and 36, the Government would not contest the State's title thereto, but the State would be required to assign other and valid base * * *"

This is a clear indication that the Land Department in this instance, which, we may parenthetically remark, seems to be the only other instance brought to light where the question was presented to the Land Department, conceded that if the State had sold or patented out, or had contracted to sell or patent, any of the lands in the resurveyed school sections, the United States *would not contest the State's title thereto.* The Commissioner there apparently took the position that if the State had so sold or patented these lands, the United States should not

disturb the title of the State's grantees or patentees, but if it desired reimbursement for these lands, should require the State to assign to the United States lands elsewhere to which the State had title under the school land grant.

Is not that exactly the situation here? It is indeed strange that more than 33 years after the State issued its patent to Jordan, the United States now, for the first time, asserts title to this land as against the grantee (or his successors in interest) of the State of California. Why did not the United States adopt the course recommended in Assistant Commissioner Havell's letter of May 2, 1925, and, if it thought that its rights had been prejudiced, demand *from the State of California* the assignment of lands elsewhere in an amount sufficient to make up the claimed excess that the State had received? This Court should note that, while the State was not made a party to this litigation, the United States *has never, since the date of the patent to Jordan, asserted any claim against the State, or attempted to recover this land, or an equal amount of land elsewhere in lieu thereof, from the State.* This suit, as stated by the Court below in its opinion (R. 42) appears to be the first case of record where the United States has ever attempted to take such action, *and in the only other instance disclosed by the record where it appeared that the State had sold or disposed of, or might have sold or disposed of school lands in a resurveyed school section, the land office took the position that it would not disturb the title of the State's grantees if the State had disposed of or contracted to dispose of such land!*

C. That title to similarly situated lands in other townships in the State of California may now be in the United States or its successors is not determinative of the question of title to the land here involved.

It may well be that, as pointed out by appellant in his brief (page 16 et seq.), the similarly situated lands in other townships in the State of California are now in the United States or its successors in interest. However, the situation in such other townships is not material to the determination of the question of title to the land here in litigation.

In such other resurveyed townships the State not only made no claim to the lands covered by the resurveys, but in fact stood by while the United States patented out such land as its own. If this amounted to a waiver by the State of its title in such a situation, the State presumably had the right to make such waiver, and, in effect, the State then abandoned its title to any acreage of school lands in those sections in excess of the acreage as established on the basis of the original surveys. That was not done in our situation. As we have shown, the State under the terms of the Granting Act was entitled to 1280 acres *or more* in each township, and the right of the State to school lands in any township could, therefore, be settled between the State and the United States on any basis of 1280 acres or more.

If the State through inaction, or in any other way, wished to abandon any claim to lands in excess of, say, 1280 acres, in those townships, that is of no importance here.

Appellant has asserted that the State never actually claimed title to the land in litigation because Surveyor

General Kingsbury was of the opinion that it did not belong to the State. We think this contention can be briefly dismissed with the observation that it is rather plain that the action of the District Court of Appeal of the State of California in the case of

Jordan v. Kingsbury, 25 Cal. App. 166, 143 Pac. 69 (1914),

amounted to a claim by the State—in other words, it amounted to State action. One administrative officer of the State was simply overruled by the judicial arm of the State which was of higher authority, and there can be no doubt that this amounted to a claim by the State. Court action is State action,

Shelley v. Kraemer, 334 U.S. 1 (1947).

In the instant case, the State of California claimed the land included within Section 36, as delineated by the Carpenter survey, and thus claimed a total acreage of school land within the township of 1583.14 acres. There was nothing in the Act to prevent the State from receiving this amount of land, and there was nothing the Land Department could or should have done in this case to prevent the State from acquiring legal title to this amount of acreage of school land in the township.

Appellant argues (Brief, p. 16) that there was no reason why the decision in

Jordan v. Kingsbury, 25 Cal. App. 166 (1914),

should have been known to the Department of the Interior, or, if it were known, why the Department should have taken any action thereon, and, therefore, that inaction on the part of the United States at the time of this decision is no reason for divesting the United States of

its title. This argument overlooks the fact that from the time of the Carpenter survey in 1893 until the commencement of this action, the United States never did anything to assert title to the land in question, and up to that time there was no reason for the *State* to do anything in the way of asserting title, because of the firmly established rule that the Carpenter survey itself passed title to the State. *Neither the State, the Land Department, nor anyone else could add anything to the force and effect of that survey as passing title.* If the State, after the approval of a survey of a school section, had asked the Land Department to "do something" to show that the United States "intended" to vest title to such school lands in the State, the answer of the Land Department would necessarily have been that there was nothing that they, or anyone else, could do to bring about this result for the reason that when the survey was approved, *such approval operated to vest title,* and everything that could be done in the way of vesting title had already been done. The fact remains that long before the United States had advanced any claim to the land in litigation, the State of California *had* claimed it as school land, and patented it out; no "recognition" of this claim by the Land Department could have added anything to the effect of the Carpenter survey, under the authorities noted in the first part of this brief.

VI.

THE DECISION OF THE COURT BELOW WILL NOT RESULT IN THE UNSETTLING OF TITLES ELSEWHERE.

Appellant expresses the fear that the decision of the District Court will result in unsettling titles in every other resurveyed township in the State of California or elsewhere where the section lines of school sections have been relocated and seeks to urge this unfounded fear as a reason for reversing the judgment. Such, however, will not be the result of the decision by the District Court; on the contrary, the decision puts at rest all such titles as they now and have for many years existed.

As we have pointed out, under the plain words of the Granting Act of 1853, title to any unappropriated and otherwise available public land which, due to a resurvey was included within the boundary of a Section 16 or 36, vested in the State of California. Furthermore, if such land was pre-empted, or for some other reason unavailable, the State of California thereby became entitled to lieu land.

Had the State acted with relation to such townships as it did in this particular township, that is, patented out any such land included within a Section 16 or 36 as a result of a resurvey, then the titles resulting from such patent should thereafter have been unassailable by the United States. However, where the State of California stood by without protest while the United States patented out such land, then titles deraigning from such United States patents should be likewise unassailable. It is the latter situation which obtained in the other townships of

the State of California which are referred to in appellant's brief (Brief, p. 17); it is the former situation which has occurred in Township 29 South, Range 20 East, M.D.B.M. In sum, it can be said that the rights of the State of California and of the United States respecting school lands in this township where the State claimed the land included in a resurveyed Section 16 or 36, and in other townships where the State made no such claim, have long since been set at rest and should remain as they are; the decision of the District Court can in no way affect such titles.

The fact that Kingsbury as State Surveyor General and Register of the State Land Office, or his predecessors or successors in office, may have erroneously thought that the State had no title to Sections 16 or 36 as delineated by a resurvey, and may erroneously have stood by and permitted the State to lose its title when the Land Department assumed to patent out these lands to purchasers in good faith, certainly cannot operate to divest the State in this case of the title which it took under the terms of the Granting Act, because in this case that situation did not occur. The fact that the Land Department in other instances may erroneously have assumed to patent out such resurveyed sections and the fact that the patentees thereof may have acquired a good title as against the State of California because the State is now, through its own inaction, unable to assert any title as against these patentees again cannot operate as a construction of or limitation upon the grant of title to the State. The reason that titles in other resurveyed

townships must and will remain at rest under the decision of the District Court is that the State lost the title which it once had; in this case, the State never waived or became estopped to assert the title which it received under the Granting Act, because in this one instance at least, State Surveyor General Kingsbury's erroneous assumption was corrected by the judicial arm of the State. It is thus plain that the decision of the District Court is the only one which will not result in unsettling titles.

CONCLUSION.

Since this is a quiet title action, if appellant is to succeed it must do so on the strength of its own title and not on the weakness, if any, of the appellees' title. Unless the appellant has demonstrated as a matter of law that title to the land in litigation did not vest in the State of California under the Granting Act of 1853 upon the approval of the Carpenter survey, then this appeal must fail.

Appellees submit that:

The argument of appellant that the Reed survey fixed forever the rights of the State because the United States could not thereafter recover any of that land from the State and because the State had received all the land to which it was entitled fails because, as we have shown, there is nothing in the Granting Act to prevent the State from receiving additional acreage which, in fact, has happened repeatedly; there is no specified amount of land

which under the law can be said to be "all the school land to which a state is entitled".

For the same reason there is no estoppel on the part of the State of California to take title to the land in question and this is so for the additional reason that this land was never a part of the original "Reed Township" to which any supposed estoppel must necessarily be limited.

The argument that the "practice" of the United States and the State in other resurveyed sections governs here necessarily falls because, in fact, the Act is not susceptible of administrative construction, and even if it were, there was no uniform administrative interpretation of the Act. Indeed, the position of the Land Department, in the only other instance disclosed by the record where the question was raised as to the State patenting out, or contracting to sell, the land in a resurveyed school section, was that the title of the State's patentees should not be disturbed.

What happened in other townships is immaterial because, as a matter of fact, the State did assert its vested titled in this instance although in other townships the State may have lost its once vested title because of the mistaken action of the officials of the State and the Land Department.

The decision of the District Court does not and cannot create "two Sections 36" because as a matter of law, at any given moment of time there can be but one legally existing Section 36 in any township, and the land in

litigation lies within that Section; the effect of the Carpenter survey of 1893 does not and legally could not depend upon "intent" of the Commissioner of the General Land Office at the time he ordered it made, but must depend upon what the law has uniformly and consistently held to be the effect of the making and approval of such survey.

In conclusion, we may remark that if appellant succeeds in this action in unsettling titles that have stood without question for over 33 years, and for more than 54 years after the State acquired its title under the Carpenter survey, the fear expressed by appellant concerning unsettling of titles will be very real indeed. Every title founded upon a congressional grant, thought to be secure and derived from the supreme authority having the power to make the grant, will be subject to attack on this or some similar ground whenever officers of the Government see fit to attempt to recapture real property for some purpose supposed to be in the interest of the Government.

If appellant can now assert title to the land in litigation, there is no logical reason why it could not reverse its position and bring suit to recover from the State of California or its successors in interest the land included in the Reed or any other original survey, but excluded from the Carpenter or any other subsequent survey, although appellant, as a ground of argument for urging that the judgment here be reversed, not only admits but asserts that this could not be done.

Appellees submit that the judgment of the District Court is both legally and equitably correct and should be affirmed.

Dated, San Francisco, California,
May 5, 1950.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

The Act of March 3, 1853, 10 Stat. 244, provides:

Sec. 6. *And be it further enacted,* That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, which shall be and hereby are granted to the State for the purposes of public schools in each township, and with the exception of lands appropriated under the authority of this act, or reserved by competent authority, and excepting also the lands claimed under any foreign grant or title and the mineral lands, shall be subject to the preemption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the State of the time and place of sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter presented.

* * *

* * * * * * *

Sec. 7. *And be it further enacted,* That where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof, agreeably to the provisions of the act of

Congress approved on the twentieth of May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships, not before provided for," and which shall be subject to approval by the Secretary of the Interior. And no person shall make a settlement or location upon any tract or parcel of land selected for a military post, or within one mile of such post, or on any other lands reserved by competent authority; nor shall any person obtain the benefits of this act by a settlement or location on mineral lands.